UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT; ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS. RECORDS INC.; and **UMG RECORDINGS INC.**, *Plaintiffs*, v. **JAMMIE THOMAS**, *Defendants*.	Case No. 06-cv-1497 (MJD/RLE) JURY DEMANDED

DEFENDANT'S PROPOSED
UNAGREED-UPON JURY INSTRUCTIONS

Attached hereto are Defendant Jammie Thomas' Proposed Unagreed-Upon Jury Instructions.

Dated: June 1, 2009

Respectfully submitted,

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DEFENDANT’S PROPOSED JURY INSTRUCTION NO. 1

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the records or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records, or other underlying evidence.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

The plaintiffs in this case allege that the defendant infringed their copyrights in certain musical works. In order to prevail on their copyright-infringement claims, each plaintiff must prove five elements with respect to each musical work at issue:

1. that the plaintiff owns the copyright in the musical work;
2. that the plaintiff's copyright, if any, is valid;
3. that the defendant either:
   a. copied the musical work without a license to do so; or
   b. distributed the copyrighted musical work to a third person without a license to do so; and
4. that the defendant's copying or distribution, if any, does not constitute "fair use"; and
5. that the defendant's copying or distribution was substantially harmful or, if widespread, would substantially and adversely affect the potential market for the copyrighted musical work.

If you find that any of the plaintiffs (CAPITOL RECORDS INC., SONY BMG MUSIC ENTERTAINMENT, ARISTA RECORDS LLC, INTERSCOPE RECORDS, WARNER BROS. RECORDS INC., or UMG RECORDINGS INC.) has proved each of these five elements with respect to a particular musical work, then you should find for that plaintiff with respect to that work.

If, however, you find that any of the plaintiffs did not prove each of these five elements, then you should find for defendant with respect to each such plaintiff and not decide any amount of damages.

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1. Pinkham v. Sara Lee Corp., 983 F.2d 824 (8th Cir. 1992) (ownership as element).
2. Mulcahy v. Cheetah Learning LLC, 386 F.3d 849 (8th Cir. 2004) (validity as element).
3. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. at 432 (particular rights, fair use as element in noncommercial case and presumption of fair use, requirement of “substantial harm” in noncommercial case).

DEFENDANT’S PROPOSED JURY INSTRUCTION NO. 3

Even unauthorized uses of a copyrighted work are not necessarily copyright infringement. To prevail on their claim for copyright infringement, the plaintiffs must prove that defendant’s copying or distribution, if any, of the copyrighted musical works at issue, if any, was not “fair use.”

In deciding whether an act of copying or distribution was “fair use,” you must consider the following factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market or value of the copyrighted work.

You may also consider any other factors that occur to you or that are argued to you by the lawyers in this case.

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1. 17 U.S.C. § 107 (statutory fair use factors)
2. Mulcahy v. Cheetah Learning LLC, 386 F.3d 849 (8th Cir. 2004) (“The statute, 17 U.s.C. § 107, sets out four non-exclusive factors that ‘shall’ be considered in determining whether an otherwise infringing use is a non-infringing fair use.”).
3. Campbell v. Acuff-Rose Music Inc., 510 U.S 569 (1994) (“The task is not to be simplified with bright-line rules, for th staute, like the doctrine it recognizes, calls for case-by-case analysis . . . [the] examples given . . . provide only general guidance about the

sorts of copying that courts and Congress most commonly had found to be fair uses.”).

4. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (“The House Report expressly stated that the fair use doctrine is an ‘equitable rule of reason’ in its explanation of the fair use section: ‘Although the courts have considered ad ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts . . . .”).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

It is not copyright infringement for the defendant to copy, for her personal use, music from a CD that she purchased.

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1. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)(copying deemed fair use where it merely enabled further personal access to a work lawfully purchased in the first instance).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

In this case, each plaintiff has elected to recover "statutory damages" if you find for that plaintiff. Each plaintiff is ordinarily entitled, if you find for that plaintiff, to not less than $750 nor more than $30,000 per musical work copied or distributed, as you consider just.

If the plaintiff proves that the defendant infringed its copyright willfully, then you may award not less than $750 nor more than $150,000 per musical work copied or distributed, as you consider just. A defendant commits copyright infringement "willfully" if she has knowledge that her actions constitute copyright infringement.

If, on the other hand, the defendant proves that she was not aware and had no reason to believe that her acts constituted an infringement of copyright, then you may reduce your award to not less than $200 per musical work copied or distributed, as you consider just.

If you find for defendant, then you should award no damages.

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1. 17 U.S.C. § 504.